In the High Court of Judicature at Madras

Dated : 17.8.2007

Coram :-

The Honourable Mr.Justice K.RAVIRAJA PANDIAN
and
The Honourable Mrs.Justice CHITRA VENKATARAMAN

Tax Case (Appeal) Nos.648 to 651 of 2007

M/s.Southern Petrochemical Industries
Corporation Limited
97, Mount Road, Guindy
Chennai 600 032. .. Appellant

Vs

The Deputy Commissioner of Income Tax
Special Range VI
Chennai .. Respondent

TAX CASES (APPEALS) under Section 260A of the Income Tax Act against the order of the Income Tax Appellate Tribunal Madras 'B' Bench dated 27.1.2006 made in I.T.A.No.1204,1205,1216 & 1217/Mds/01 for the assessment year 1993-94, 1994-95, 1995-96 and 1996-97 respectively, against the Order in ITA.101/96-97,477/96-97,523/97-98,46/99-2000 respectively dt.23.5.01 30.5.01 7 23.5.01 on the file of the Commissioner of Income Tax (Appeals) -V, Chennai and against the Order in PAN/GIR.No.47/031-CY-0851/16-5, AAACS.4668K/16.5 respectively dt.20.3.96, 11.12.96,12.12.97 & 12.3.99 on the file of the Dy Commissioner of Income Tax Special Range-VI, Madras-34 & on the file of Joint Commissioner of Income Tax Special Range, Chennai.

For Appellant : Mr.Venkatanarayanan
for Ms/.Subbaraya Aiyar

JUDGMENT

JUDGMENT OF THE COURT WAS DELIVERED BY K.RAVIRAJA PANDIAN,J

The appeals are filed by the assessee against the order of the Income Tax Appellate Tribunal Madras 'C' Bench made in I.T.A.Nos.1204 to 1207 /Mds/2001 dated 27.1.2006 The relevant assessment years are is 1993-94, 1994-95, 1995-96 and 1996-97.

T.C.(A) Nos.648 and 649 of 2007:

2. As the facts are one and the same in both the appeals except the figures arrived at, the facts relating to the assessment year 1993-94 as culled out from the statement of facts are stated as follows:-

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The appellant is engaged in the business of manufacture and distribution of chemical fertilizers and heavy chemicals. For the assessment year 1993-94 the appellant filed a return of income on 30.12.1993 claiming a loss of Rs.10,72,53,977/-. Regular assessment under Section 143(3) was completed on 20.3.1996 determining the loss at Rs.6,86,45,961/-. While making the assessment, the assessing officer disallowed the depreciation claimed by the appellant at 15% of the floor area of SPIC Centre building which was leased out. The assessing officer further disallowed the expenditure incurred for issuance of zero bond. Aggrieved against the order of assessment, the appellant filed an appeal to the Commissioner of Income Tax (Appeals) who by his order dated 23.5.2001 rejected the appeal and upheld the order of assessment. The assessee filed further appeal to the Tribunal to have an order of confirmation of the orders of the lower authorities. The correctness of the said order of the Tribunal is canvassed by filing the present appeals formulating the following two questions of law.

1. Whether on the facts and in the circumstances of the case the Appellate Tribunal was right in law in holding that the income from exploitation of the commercial asset should be assessed as 'income from House Property ' and not as "Business income' and consequentially not entitled to depreciation on the portion of the building leased out ?

2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the expenditure incurred in issuing 'Zeor bonds' to meet the working capital is capital in nature and hence entitled to only 1/10th of the deduction ?

3. Learned counsel appearing for the appellant submitted that the first question of law is covered against the appellant by the decision of this Court in COMMISSIONER OF INCOME-TAX VS. CHENNAI PROPERTIES AND INVESTMENT LTD.(2004) 266 ITR 685). In that case, the Division Bench of this Court after taking stock of almost all earlier cases on that issue including the Constitution Bench judgment of the Supreme Court in the case of SULTAN BROTHERS PRIVATE LIMITED VS. COMMISSIONER OF INCOME TAX((1964) 51 ITR 353) and the guidelines issued by the Supreme Court in the case of UNIVERSAL PLAST LIMITED VS. COMMISSIONER OF INCOME-TAX ((1999) 237 ITR 454) has ultimately held that although it was held by the Constitution Bench in the case of Sultan Brothers ((1964) 51 ITR 353 (SC)), that whether a particular letting was business has to be decided in the circumstances of each case and that each case has to be looked at from a businessman's point of view to find out whether the letting was the doing of a business or the exploitation of his property by an owner, in all the cases, which have come before the Courts involving commercial or residential buildings owned by the assessees, it has been held that the income realised by such owners by way of rental income from the building, whether a commercial building or residential house, is assessable under the head "Income from house property". The only exceptions are cases where the letting of the building is inseparable from the letting of the

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machinery, plant and furniture. In such cases it has been held that the rental would not have been realised but for the letting out of the machinery, plant or furniture along with such building and therefore the rental received for the building is to be assessed under the head of "income from other sources".

4. On the facts of the present case, it is clear that the appellant being owner of the property exploited the property by leasing out the same and realised the income by way of rent and such rental income is liable to be assessed under the head "income from house property". Therefore, following the decision of this Court in the case of COMMISSIONER OF INCOME-TAX VS. CHENNAI PROPERTIES AND INVESTMENT LTD.(2004 (266) ITR 685), the first question of law is answered against the assessee.

5. In respect of the second question of law, it is contended that the Circular No.56 dated 19th March 1971 issued by the Central Board of Director Taxes inter alia says that the expenditure incurred on the issue of debentures is an admissible deduction in the light of the decision of the Supreme Court in INDIA CEMENTS LIMITED VS. COMMISSIONER OF INCOME-TAX, MADRAS reported in (1966) LX ITR 52. The said circular was the subject matter of Delhi High Court in the case of COMMISSIONER OF INCOME-TAX VS. THIRANI CHEMICALS LIMITED reported in 290 ITR 196, wherein the Delhi High Court has held that in view of the said circular of the Central Board of Direct Taxes, the expenditure incurred on the issue of debenture was a permissible deduction. On the same reasonings, the expenditure incurred by the assessee in this case in issuing Zero Bond has to be allowed as a permissible deduction.

6. We heard the argument of the learned counsel for the assessee and perused the materials on record.

7. India Cements case (1966) LX ITR 52 was one in which the appellant atherein obtained a loan of Rs.40 lakhs from the Industrial Finance Corporation secured by a charge on its fixed assets. In connection therewith, it spent a sum of Rs.84,633/- towards stamp duty, registration fees, lawyer's fees, etc., and claimed that amount as business expenditure. The Supreme Court on the said facts held that the amount spent was not in the nature of capital expenditure and was laid out or expended wholly or exclusively for the assessee's business and therefore available as a deduction under section 10(2)(xv) of the Indian Income-tax Act, 1922. The Court further held that the act of borrowing money was incidental to carry on of business, the loan obtained was not an asset or an advantage of enduring nature, the expenditure was made for securing the use of money for a certain period, and it was irrelevant to consider the object with which the loan was obtained. The Court further held that where there is no express prohibition, an outgoing, by means of which an assessee procures the use of a thing by which he makes a profit, is deductible from the receipts of the business to ascertain the taxable income. It was further held that obtaining capital by issue of shares is

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different from obtaining loan by debentures. A loan obtained cannot be treated as an asset or advantage for the enduring benefit of the business of the assessee.

8. The circular on which reliance has been placed is not placed before this Court. On the reading of the Delhi High Court judgment in COMMISSIONER OF INCOME-TAX VS. THIRANI CHEMICALS LIMITED reported in 290 ITR 196, it could only be seen that the Circular No.56, dated 19th March, 1971 inter alia says that the expenditure incurred on the issue of debentures was an admissible deduction in the light of the decision of the Supreme Court in India Cements Ltd. Vs. CIT (1966) 60 ITR 52 (SC). The circular extends the logic underlying the said decision to cases where the expenditure is incurred by the assessee by issue of debentures as was the position in the case before the Delhi High Court. It could be seen from the Thirani Chemicals case that the circular specifically states the expenditure incurred on the issue of debentures would be a permissible deduction notwithstanding the introduction of Section 35D. It is relevant to state that even in the India Cements case referred supra, the Supreme Court has held that obtaining capital by issue of shares is different from obtaining loan by debentures. On the basis of that finding only, it appears that the circular would have been issued with reference to the expenditure incurred on the issue of debentures. In the case on hand also, the assessee claimed a sum of Rs.3,80,000/- as expenses towards issuance of debentures. Though the assessing officer has disallowed the expenses so claimed, that was allowed by the Commissioner of Income-tax (Appeals) in favour of the assessee.

9. The contention of the appellant cannot be accepted for the following reasons also:

"Zero Bond is nothing but a bond that pays no interest while the investor holds it. It is sold originally at a substantial discount from its eventual maturity value, paying the investor its full face value when it comes due, with the difference between what he paid initially and what he finally collected representing the interest he would have received over the years it was held."
(vide P.Ramanatha Iyer's Advanced Law Lexicon, 3rd Edition, 2005)

10. The assessing officer has recorded a finding that in the course of assessment proceedings, it was represented on behalf of the appellant that the income by issuance of zero bonds has been obtained for implementation of new projects and reutilise the capital for future requirement of working capital expenditure. The assessing officer rejected the claim as new projects are being implemented with the capital, there would be enduring benefits accruable over the period of years, not relating only to the current assessment year and allowed 1/10th of the expenditure incurred for the current assessment year.

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11. Before the Commissioner of Income Tax (Appeals), the appellant raised additional grounds and contended that the zero bonds are akin to debenture. Zero bonds has to be treated as a revenue expenditure in the light of the Supreme Court decision in the case of INDIA CEMENTS LIMITED reported in 60 ITR 52. The Commissioner of Income-tax (Appeals) distinguished the India Cements case on the facts of the present case by explaining that the decision of India Cements case relates to the matter of allowability of business expenditure for raising loan on mortgage on fixed assets on items towards stamps, registration fees, lawyer fees, etc., and the decision is not in any way help the assessee in claiming the expenses incurred in issuance of zero bonds. It is pertinent to note that though additional grounds have been take before the Commissioner of Income-tax (Appeals), the circular with which reliance has been made by the assessee before this Court has not either been placed or argued before the first appellate authority or before the Tribunal. A further additional factor against the appellant on this point is that the appellant itself treated the expenditure incurred in issuing zero bond on the capital field and claimed deduction under Section 35-D which was granted by the assessing officer. Hence, the appellant cannot claim further deduction as revenue expenditure. Thus, the second question of law is also answered against the appellant.

12. In the result, the appeals are dismissed.

T.C.(A) Nos.648 and 649 of 2007:

13. For the assessment years 1995-96 and 1996-97, the appellant formulated the following questions of law:

"1. Whether on the facts an din the circumstances of the case the Appellate Tribunal was right in law in holding that the income from exploitation of the commercial asset should be assessed 'income from House Property ' and not as "Business income' and consequentially not entitled to depreciation on the portion of the building leased out?

2. Whether on the facts and in the circumstances of the case, the Appellate Tribunal was right in law in holding that the appellant is not entitled to deduction in respect of doubtful debts and advances that have become irrecoverable ?

3. Whether the Appellate Tribunal was justified in not appreciating that the provision made in respect of Non-performing Assets if not allowable as a bad debt is allowable as a business loss?"

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14. As the facts are one and the same in both the appeals except the figures arrived at, the facts relating to the assessment year 1995-96 as culled out from the statement of facts are stated as follows:-

For the above assessment year, the appellant had debited to profit and loss account a sum of Rs.8,92,000/- towards provision for bad and doubtful debts. The assessing officer disallowed the provision by rectifying the intimation on the ground that the same was not written off in the books of account and assessment order was passed to that effect under Section 143. Having been unsuccessful in the appeals before the Commissioner of Income-tax (Appeals), the assessee filed further appeal before the Tribunal. The Tribunal relying upon a decision of CIT VS. MICROMAX SYSTEMS P. LTD., (2005) 277 ITR 409), rejected the same. The correctness of the said order is canvassed by filing the present appeals.

15. The first question of law is covered against the assessee for reasons stated in T.C.(A) No.648 of 2007 supra.

15A. In CIT VS. MICROMAX SYSTEMS P. LTD., (2005) 277 ITR 409, by taking note of the amendment incorporated in Section 36(1)(vii), the Division Bench of this Court held that no doubt prior to April 1989 even if the debt had been written off it could be allowed as a "bad debt" if the assessee could establish that the debt had in fact become bad. However, after the amendment with effect from April 1, 1989, there is an additional requirement in Section 36(1)(vii) namely that the "bad debt" should be written off as irrecoverable in the accounts of the assessee for the previous year. Hence unless it is written off as irrecoverable in the accounts, it cannot be allowed as bad debt. In view of the statutory requirement and in the light of the judgment above referred to, the second question of law is covered by the decision against the assessee.

16. In respect of the third question of law, the counsel for appellant fairly submits that it does not arise for consideration as no such ground was taken rather argued before any of the authorities below. The same is recorded and rejected as it does not arise for consideration.

17. In fine, the appeals are dismissed.

krr/usk

Sd/-
Asst.Registrar

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Sub Asst.Registrar

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To,

1. The Asst.Registrar, Income-Tax Appellate Tribunal,
   IIIrd Floor, Rajaji Bhavan,
   Besant Nagar,Chennai

2. The Commissioner
   of Income-tax (Appeals) - V
   121,Mahatma Gandhi Road,
   Chennai-34.

3. The Deputy Commissioner
   of Income-tax
   Special Range-VI, Chennai.

4. The Joint Commissioner of Income Tax,
   Special Rang-VI,
   Chennai.

RA(CO)
dcp/11.9 Tax Case (Appeal)Nos.648 to 651 of 2007

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